

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1881~~

70-78

Supreme Court, U.S.
FILED

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E. ROBERT SEAVEN, CLERK

AFFILIATED UTE CITIZENS OF THE STATE OF

UTAH, an unincorporated association formed by and under the supervision of the Secretary of the Department of the Interior pursuant to Public Law 83-671 (25 U.S.C. §§ 677-677aa) composed of 490 so-called "mixed-blood" members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, suing on its own behalf and as representative for and on behalf of its 490 members and their heirs and legal representatives as a class; and the 490 so-called "mixed-blood" members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, individually and as an identifiable Indian group or band,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

ANITA REYOS, et al.,

Petitioners,

vs.

FIRST SECURITY BANK OF UTAH, N.A., UNITED STATES OF AMERICA, JOHN B. GALE AND VERL HASLEM,

Respondents.

BRIEF OF JOHN B. GALE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	6

CASES CITED

Janigan v. Taylor, 344 F. 2d 781 (1st Cir. 1965) cert. denied 86 Sup. Ct. 153 (1965)	6
List v. Fashion Park, Inc., 340 F. 2d 457 (2nd Cir. 1965) ..	5

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October Term, 1970

No. 1331

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Respondent John B. Gale ("Gale" herein), defendant and appellant in the courts below, prays that the petition for writ of certiorari to review the United States Court of Appeals of the Tenth Circuit as it applies to the respondent Gale be denied.

STATEMENT OF THE CASE

The statement of the case as set forth in the petition for writ of certiorari fails to clearly set forth the facts as they relate to the respondent Gale. The following statements quoted directly from the opinion of Judge Seth present the facts in a very objective manner which the respondent Gale adopts as his statement of the case.

The only cause of action alleged against the individual defendants Gale and Haslem is based upon the violation of Regulation 10b-5 of the Securities and Exchange Commission (17 C.F.R. § 240.10b-5). This regulation was promulgated under the authority of section 10 (b) of the 1934 Securities and Exchange Act. This cause of action is also asserted against the defendant bank. Each plaintiff states a separate cause against each of such defendants.

The record shows that the defendant Gale purchased for resale for his personal profit ten shares of UDC stock from two of the plaintiffs. The several plaintiffs sold 122 shares of their stock in some thirty-two separate transactions. The trial court found that defendant Gale liable on the sale of all of the 122 shares.

As to individual purchases, the record shows that Gale bought five shares from the plaintiff, Glen V. Reed, on July 8, 1964, for \$350 per share. This purchase was made by Gale for Neal H. Phelps and Esther Phelps, or were resold to such persons who paid Gale \$530 per share for these shares. Defendant Gale did not advise plaintiff Reed of the resale.

Gale also purchased three shares of stock from the plaintiff, Letha H. Wopsock, some time after August 21,

1964, for \$350 per share for resale at a higher price which is not disclosed in the record. He also purchased another share from the same person in October 1964 for \$400 and an additional share in November 1964 for \$350. The disposition by Gale of these two shares is not indicated in the record.

The record does not show whether or not the defendant Gale participated for his personal profit or derived a personal profit from the purchase by other persons of shares of stock from the plaintiffs.

The participation by the defendant Gale in the sales by other plaintiffs to other persons as shown in the record need not be described in detail. In these transactions a typical participation by the defendant Gale was to act as a notary upon affidavits executed by the purchaser in connection with such a sale which have been hereinabove described, or to guarantee the seller's signature on a stock power which was the ultimate basis for the transfer of the shares of stock. As indicated above the trial court found the defendant Gale liable on each of these transactions. However, we hold this to be in error.

The "participation" by the defendant Gale in the execution of documents as shown by the record in connection with these sales cannot constitute a breach of duty on his part to any of the plaintiffs. In this connection he did no more than to perform ministerial functions required to carry out the transfer of the shares of stock. In this connection the defendant had no obligation to determine whether the recitations made in the affidavit were correct or not. Furthermore, even if he may have known that the recitations in this affidavit were not entirely correct, the plaintiff executing the particular affidavit was prepared and did assert that the facts were correct, and defendant Gale had no obligation to perform anything but the requested ministerial acts. (Petitioners' Appendix B, 114-116).

ARGUMENT

The claim of the petitioners against respondent Gale is based solely on an alleged violation of Regulation 10b-5 of the Securities and Exchange Commission, therefore, only one of the four arguments advanced in the petition for writ of certiorari applies to the respondent Gale. Argument number IV states that the basis on which the court of appeals rejected the duty of disclosure under rule 10b-5 threatens the federal scheme of protection of investors. In support of this position, the petitioners make the general statement that this is of great national importance because it circumscribes the rule of liability under rule 10b-5, yet, as the petition is analyzed, no conflict is presented between this decision and the decision of any other circuit court of appeals.

The court of appeals in this case ruled that the bank is not exempt from violation of rule 10b-5, in fact, the court ruled quite the contrary:

The record clearly shows that the defendant bank, the employer of the defendants Gale and Haslem, had knowledge that its employees were purchasing stock for their own account. Further, the record shows that in these transactions, the employees used the bank facilities, premises and personnel. Under these circumstances, these employees, as far as the plaintiffs were concerned, were apparently acting within their authority. Thus, the bank did become liable for any violation of the regulation 10b-5. (Petitioners' Appendix B, 117.)

Petitioners' second point does not apply to Gale because he was not included in the second count of petitioners' complaint wherein it is alleged that the bank had violated rule 10b-5 and also its so-called "fiduciary duties" to the petitioners.

The third and final point made in the petition for certiorari is that the court of appeals is in error because it imposes a requirement of "direct dealing or privity" under rule 10b-5. Careful analysis of this argument, however, reveals that petition-

ers urge that the requirement of reliance be eliminated as an element to be proved by the plaintiff in a rule 10b-5 case. This point is the thrust of the entire argument and logically so because petitioners failed to present any evidence at the trial court level showing that petitioners relied on the representations of Gale when they sold their stock.

The decision of the court of appeals was that reliance by the plaintiff upon representations of the defendant is a prerequisite to recovery and because there was no evidence in the record that petitioners relied upon the representations of Gale when they sold their stock, damages could not be recovered by petitioners. It should be noted that in all of the cases yet to come before the trial court (this was a bell-weather case) if the petitioners prove reliance, which was apparently overlooked in this case, petitioners will be entitled to recover damages from Gale for violation of rule 10b-5.

Petitioners are therefore appealing the decision of the court of appeals, not because it limits the scope of liability, but because they want to be allowed damages in the absence of reliance by the petitioners on the representations of Gale.

The decision of the court of appeals follows the well-established rule in civil cases under rule 10b-5 as pronounced in *List v. Fashion Park Inc.* 340 F. 2d 457 (2 Cir 1965):

Disagreement centers on the applicability and meaning of the requirement that reliance be placed upon the misrepresentation. Our examination of the authorities satisfies us that this requirement also carries over into civil suits under rule 10b-5, *Reed v. Riddle Airlines* 266 F. 2d 314, 319 (5 Cir 1959); *Kohler v. Kohler Co.*, 208 F. Supp. 808, 823 (E.D. Wis. 1962) *aff'd* 319 F. 2d 634 (7 Cir 1963); *Mills v. Sarjem Corp.* 133 F. Supp. 753, 767 (D.N.J. 1955); *Speed v. Transamerica Corp.*, 5 F. R.D. 56, 60 (D. Del. 1945); accord III loss, Securities Regulation 1765-66. The *dicta* in *Kardon v. National Gypsum Co.* 83 F. Supp. 613, 614 (E.D. Pa. 1947) are not necessarily to the contrary.

See also *Janigan v. Taylor* 344 F. 2d 781 (1st Cir 1965) Cert. denied 282 US 8799; 86 Supreme Ct. 53, 15 L Ed2d 120 (1965).

Judge Seth writing for the court applied these authorities to the facts of the instant case as follows:

In the case before us the facts of misrepresentation have been shown as to several of the transactions. The record, however, does not contain any evidence relating to reliance by the plaintiffs on the representations of the defendants Gale and Haslem. This is a necessary element of the cause alleged. *List v. Fashion Park Inc.* 340 F. 2d 457 (2d Cir.), considers, defines and requires both materiality of the representations and reliance. See also, 16 UCLA L. Rev. 404; 63 Nw. U.L. Rev. 434. The plaintiffs allege that certain acts and statements of the defendants were directed to them or were the proximate cause of their damages. Thus, the causal connection must be established — that in fact the loss resulted from defendants' acts — a simple and fundamental proposition in such actions for private damages. (Petitioners' Appendix B, 120).

CONCLUSION

It is the position of the respondent Gale that the decision of the Tenth Circuit Court of Appeals as regards to rule 10b-5 is not in conflict with any other court of appeals nor is there any issue raised by the case which merits review by this court. The unusual and unique facts of the instant case — the fact that the Secretary of the Interior outlined a detailed procedure under which the shares first had to be offered to members of the tribe before they could be sold to the general public — are such that this case will be of very little value as a guide to the future interpretation of rule 10b-5.

Respondent Gale requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

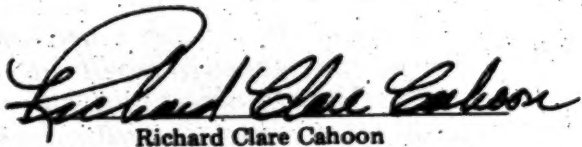
I, RICHARD CLARE CAHOON, hereby certify that I mailed a copy of the foregoing Brief of Respondent John B. Gale to the attorneys listed below at the addresses below on the 9 day of March, 1971;

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